

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph C. Sommer,	:	
	:	
Appellant-Appellant,	:	
	:	No. 13AP-412
v.	:	(C.P.C. No. 13CVF-0058)
	:	
Bureau of Workers' Compensation,	:	(ACCELERATED CALENDAR)
	:	
Appellée-Appellee.	:	

MEMORANDUM DECISION

Rendered on December 30, 2013

Joseph C. Sommer, pro se.

*Michael DeWine, Attorney General, and Timothy M. Miller,
for appellee.*

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶1} Appellant, Joseph C. Sommer ("appellant"), appeals, pursuant to R.C. 119.12, from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"). We affirm.

{¶2} The SPBR order affirmed the imposition of discipline on appellant—a written reprimand—by his employer, appellee Ohio Bureau of Workers' Compensation ("BWC"). Appellant asserts that, in disciplining him, BWC violated R.C. 124.341, one of Ohio's whistleblower statutes.

{¶3} The SPBR found that appellant was not entitled to whistleblower protection under R.C. 124.341 because he had failed to prove that the cause of his reprimand was his filing of a protected report. The SPBR found instead that the BWC reprimanded appellant because the content of his report, sent via e-mail to the office of

the Inspector General of Ohio, gave a false impression that he was speaking on behalf of the BWC or its legal department, thereby impeding the BWC's work. The SPBR found that to be a legitimate justification for discipline.

{¶4} The trial court upheld the decision of the SPBR, finding that there was reliable, probative, and substantial evidence to support it. The trial court further found that the SPBR had not invaded the exclusive jurisdiction of the Supreme Court of Ohio by referencing in its decision that the Preamble to the Ohio Rules of Professional Conduct requires that attorneys who criticize public officials do so with restraint and avoid intemperate criticisms. See Prof.Cond.R. Preamble.

{¶5} Appellant timely appeals, asserting two assignments of error:

1. The Trial Judge incorrectly interpreted R.C. 124.341 as not protecting a state employee from punishment for reporting statutory violations in a manner that did not include false information.
2. The Trial Judge did not uphold the Ohio Supreme Court's exclusive jurisdiction to interpret and enforce the Rules of Professional Conduct.

{¶6} We find that appellant's conduct does not fall within the scope of R.C. 124.341(A) because the statute did not authorize appellant to report to the Inspector General the alleged non-criminal statutory violations that were the subject of appellant's e-mailed report. Accordingly, appellant was not protected by R.C. 124.341(B) against the imposition of discipline. We therefore affirm the judgment of the common pleas court, albeit for different reasons than relied upon by that court.

{¶7} We first address the standard of review applicable in R.C. Chapter 119 appeals. In an administrative appeal filed pursuant to R.C. 119.12, the trial court must review the agency's order to determine whether such order "is supported by reliable, probative, and substantial evidence and is in accordance with law." *Fletcher v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-46, 2012-Ohio-3920, ¶ 8. In reviewing the trial court's order, the court of appeals must apply the following standard:

In reviewing the trial court's determination that an order is supported by reliable, probative, and substantial evidence, our role is confined to determining whether the court of common pleas abused its discretion. * * * However, in

*determining whether an order was in accordance with law,
this court's review is plenary.*

(Citation omitted.) (Emphasis added.) *Id.*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶8} The parties do not dispute the facts underlying this appeal. The BWC employed appellant as an attorney in its legal department from 1987 until he retired in July 2011. On May 28, 2009, appellant sent an e-mail to the Deputy Inspector General of Ohio. In his e-mail, appellant reported that he was "concerned that the Industrial Commission nominating council might not be following the requirements of R.C. 4121.02(D)." (Nov. 23, 2011 affidavit.) The e-mail suggested that appellant believed that the nominating council had also failed to meet the statutory timeline in the prior year. Appellant rhetorically asked in the e-mail "if the nominating council is composed of scofflaws, what quality of persons can we expect them to submit for appointment to the commission?"

{¶9} R.C. 4121.02(D) establishes certain statutory deadlines for submission to the governor of the names of possible appointees to the Industrial Commission of Ohio by a ten-member Industrial Commission Nominating Council. As relevant herein, R.C. 4121.02 provides that, "within sixty days of a vacancy occurring as a result of the expiration of a term and within thirty days after other vacancies occurring on the commission, the nominating council shall submit an initial list containing three names for each vacancy."

{¶10} On December 17, 2009, the BWC Assistant General Counsel issued a written reprimand to appellant, in which appellant was advised that he had violated BWC policy by sending the e-mail to the office of the Inspector General. The reprimand stated that, in sending the e-mail, appellant compromised the ability of the BWC Director and other BWC leaders to work with the members of the Industrial Commission Nominating Committee. He was further advised that his actions constituted a failure of good behavior.

{¶11} The record reflects that BWC removed the written reprimand from appellant's personnel file on December 17, 2010—one year after the date of the written reprimand. Removal of the written reprimand was consistent with Ohio Adm.Code

123:1-46-07(A), which provides: "All records relating to oral and/or written reprimands will cease to have any force and effect and shall be removed from an employee's personnel file twelve months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve months."

{¶12} The whistleblower statute at issue, former R.C. 124.341, in effect on the date of appellant's e-mail, provided as follows:

(A) If an employee in the classified or unclassified civil service becomes aware in the course of employment of a violation of state or federal statutes, rules, or regulations or the misuse of public resources, and the employee's supervisor or appointing authority has authority to correct the violation or misuse, the employee may file a written report identifying the violation or misuse *with the supervisor or appointing authority*. In addition to or instead of filing a written report with the supervisor or appointing authority, *the employee may file a written report with the office of internal auditing created under section 126.45 of the Revised Code.*

*If the employee reasonably believes that a violation or misuse of public resources is a criminal offense, the employee, in addition to or instead of filing a written report with the supervisor, appointing authority, or the office of internal audit, may report it to a prosecuting attorney, director of law, village solicitor, or similar chief legal officer of a municipal corporation, to a peace officer, as defined in section 2935.01 of the Revised Code, or, if the violation or misuse of public resources is within the jurisdiction of the inspector general, to the inspector general in accordance with section 121.46 of the Revised Code. * * **

(B) Except as otherwise provided in division (C) of this section¹, no officer or employee in the classified or unclassified civil service shall take any disciplinary action against an employee in the classified or unclassified civil service *for making any report authorized by division (A) of this section * * **

(Emphasis added.)

¹ Division (C) of R.C. 124.341 authorizes the imposition of discipline where an employee purposely, knowingly or recklessly reported false information under division (A) of the statute.

{¶13} Accordingly, pursuant to R.C. 124.341(B), an employee in the classified or unclassified civil service who has "[made] any report authorized by division (A)" of R.C. 124.341 is protected against disciplinary action imposed in consequence of the making of that report.

{¶14} We have recognized that "the burden of meeting the procedural requirements of either whistleblower statute [i.e., R.C. 124.341 or 4113.52] is upon the employee, who bears the burden of demonstrating by a preponderance of the evidence the existence of a written report *filed with the appropriate supervisor or other named authority* and providing sufficient detail to identify and describe the alleged violation." *Haddox v. Ohio Atty. Gen.*, 10th Dist. No. 07AP-857, 2008-Ohio-4355, ¶ 21, citing *Wade v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 98AP-997 (June 10, 1999).

{¶15} When appellant e-mailed his concerns to the office of the Inspector General, he did not file a written report of a possible violation of a state statute with either his supervisor or an appropriate named authority. R.C. 124.341 authorizes the filing of a report of a possible statutory violation with the Inspector General only where the employee "reasonably believes that a violation or misuse of public resources is a criminal offense."

{¶16} Appellant unsurprisingly did not suggest in his e-mail that he believed the Industrial Commission Nominating Council had committed a criminal offense in not timely forwarding the names of potential nominees to the governor. Nor is it objectively reasonable to believe that a statutory violation of that nature is criminal. To the contrary, the general rule is that " ' "a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." ' " *Pruneau v. Ohio Dept. of Commerce, Bur. of Wage & Hour*, 191 Ohio App.3d 588, 2011-Ohio-6043, ¶ 27 (10th Dist.), citing *Hardy v. Delaware Cty. Bd. of Revision*, 106 Ohio St.3d 359, 2005-Ohio-5319, ¶ 22, quoting *State ex rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002-Ohio-3992, ¶ 13, quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467 (1946), paragraph three of the syllabus. A directory statute of this nature does not limit the power of the officer to act beyond the prescribed time unless the statute includes negative words importing that the act required shall not be done in

any other manner or time than that designed. *Id.*, citing *Schick v. Cincinnati*, 116 Ohio St. 16 (1927). It is therefore unreasonable to believe that members of the Industrial Commission Nominating Committee acted criminally, even if it was true that they failed to submit nominees to the governor within the timeframe set forth in R.C. 4121.02(D).

{¶17} R.C. 124.341(A) did not authorize appellant to report to the Inspector General the alleged statutory violation he had identified. Rather, to gain the protection provided by R.C. 124.341(B), the non-criminal statutory violation perceived by appellant could only have been reported pursuant to the first paragraph of R.C. 124.341(A), which authorizes the filing of a report with other officials but not with the Inspector General.

{¶18} Appellant's two assignments of error assume that appellant had made a report as authorized by division (A) of R.C. 124.341 and fell within the scope of protection afforded by that statute. Because those underlying assumptions were incorrect, we find that appellant's two assignments of error are moot.

{¶19} The SPBR rejected appellant's contention that his written reprimand was issued in contravention of R.C. 124.341 and refused to disaffirm the written reprimand. The trial court's judgment affirming the action of the SPBR was in accordance with law because appellant was not entitled to the protection afforded by the statute. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
